Supreme Court of the United States.

No. 42.—October Term, 1906.

Charles W. Clark, Plaintiff in Error, *vs.* P. O. Wells. } In error to the Circuit Court of the United States for the District of Montana.

[November 19, 1906.]

Mr. Justice Day delivered the opinion of the Court.

This case is here upon a question of jurisdiction of the Circuit Court, duly certified under the act of March 3, 1891. (29 Stat. 492.)

The action below was commenced by Wells against Clark, September 20, 1904, in the District Court of the First Judicial District of Montana, in and for Lewis and Clark County, to recover on a promissory note in the sum of $2,500, with interest and costs. The summons in the action was returned September 22, 1904, with the indorsement by the sheriff that Clark could not be found in his county.

An attachment was sued out under the statutes of Montana, (Code of Civil Procedure, section 890 *et seq.*,) and, on September 22, 1904, was levied upon all the right, title and interest of the defendant Clark in certain lots in Butte, Silver Bow County, Montana.

On October 18, 1904, Clark, appearing for the purpose of obtaining an order of removal, and no other, and reciting that he waived no right to object to the jurisdiction of the court over his person or property, filed his petition in the District Court of Lewis and Clark County for the removal of the cause to the Circuit Court of the United States for the District of Montana, upon the ground that he was a resident of San Mateo, California, and a citizen of that State, plaintiff being a citizen of Montana.

Upon bond filed such proceedings were had that the cause was ordered, on October 18, 1904, to be removed to the United States Circuit Court for the District of Montana.

After the filing of the record in the United States court an affidavit was filed on November 3, 1904, in the office of the clerk of the United States Circuit Court for an order for service by publication upon Clark as a non-resident, absent from the State, who could not be found therein. An order was thereupon made by the clerk of the United States court for service upon Clark by publication in a newspaper in the city of Helena, Lewis and Clark County, and the mailing of a notice to San Mateo, California, the alleged place of residence of the defendant. This method of procedure

is in conformity with the Code of Civil Procedure of Montana, sections 637, 638. Publication was made, and a copy of the summons and complaint was served upon Clark at San Mateo, California, by the United States marshal in and for the Northern District of California. (Secs. 637, 638, Civil Code of Procedure of Montana.)

On December 6, 1904, Clark, appearing solely for that purpose, filed a motion to quash the service of summons upon two grounds:

"1. That the said summons has never at all or in any manner been served upon the defendant herein personally in the State and District of Montana, nor has the defendant ever at any time waived service of summons or voluntarily entered his appearance in this cause.

"2. That the publication of service herein, wherein and whereby the said summons has been published in a newspaper, does not give the court any jurisdiction over the said defendant, nor is such service by publication permissible or in accordance with the rules of procedure in the United States court, nor is the same sanctioned or authorized by any law of the United States, and the said pretended service of summons by publication is wholly and absolutely void under the laws of the United States."

The court overruled the motion and proceeded to render a judgment *in personam* against Clark for the amount of the note and costs.

It is contended by the plaintiff in error that inasmuch as the removal was made to the Federal court before service of a summons upon the defendant, and, as there was no personal service after the removal, there could be no valid personal judgment in that court for want of service upon the defendant. And it is insisted that the service by publication, if proper in such cases, could not be made under the State statute, but under the act of March 3, 1875, (18 Stat. 472; 1 Comp. Stat. 513,) permitting the court to make an order for publication upon nonresident defendants in suits begun in the circuit court of the United States to enforce any legal or equitable lien upon a claim to real or personal property within the district where suit is brought.

It must be taken at the outset as settled that no valid judgment *in personam* can be rendered against a defendant without personal service upon him in a court of competent jurisdiction or waiver of summons and voluntary appearance therein. (*Pennoyer* v. *Neff*, 95 U. S. 714; *Caledonia Coal Co.* v. *Baker*, 196 U. S. 432, 444, and cases cited.)

Nor did the petition for removal in the form used in this case have the effect to submit the person of the defendant to the jurisdiction of the State court, or, upon removal to the Federal court, deprive him of the right to object to the manner of service upon him, (*Goldy* v. *The Morning News*, 156 U. S. 518,) and the exercise of the right of removal did not have the effect of entering the general appearance of the defendant, but a special appearance only for the purposes of removal. (*Wabash Western R. R.* v. *Brow*, 164 U. S. 271–79.)

But we cannot agree with the contention of counsel for plaintiff in error, that as a personal judgment can only be rendered upon personal service, and service by publication under the State statutes cannot be made in the Federal court, and that the United States statute (Act of March, 1875, 18 Stat. 472,) is inapplicable to the case, the effect of the removal is to render nugatory the attachment proceedings in the State court.

The purpose not to interfere with the lien of the attachment in the State court is recognized and declared in the statute, (sec. 4 of the Removal Act, 24 Stat. 373,) providing that when any suit is removed from a State court to the Circuit Court of the United States an attachment of the goods or estate of the defendant, had in the suit in the State court, shall hold the goods or estate attached to answer the final judgment or decree in the same manner as by law it would have been held to answer the final judgment or decree had it been rendered by the court in which the suit was commenced, and preserving the validity of all bonds or security given in the State court.

The transfer of the cause to the United States court gave the latter court control of the case as it was when the State court was deprived of its jurisdiction. The lands were still held by the attachment to answer such judgment as might be rendered against the defendant.

The defendant had a right to remove to the Federal court, but it is neither reasonable nor consonant with the Federal statute preserving the lien of the attachment, that the effect of such removal shall simply be to dismiss the action wherein the State court had acquired jurisdiction by the lawful seizure of the defendant's property within the State.

When the jurisdiction of the State court was terminated by the removal that court had seized upon the attached property with the right to hold it to answer such judgment as might be rendered. In the absence of personal service the State statute provided for publication of notice of the pendency of the suit. If the defendant failed to appear the court might proceed to render a judgment, which would permit the attached property to be sold for its satisfaction. To render such a judgment in the absence of an appearance and defense the State court had only to require the statutory notice to the defendant when its proceedings were interrupted by the removal to the Federal court on the application of the defendant.

The Federal court thus acquired jurisdiction of a cause of which the defendant had notice, as appears by his petition for removal and the action of the State court invoked by him. The defendant, it is true, had not been personally served with process or submitted his person to the jurisdiction of either the State or Federal court. But he did not attack the validity of the attachment proceedings, which appear to be regular and in conformity to the law of the State. There was no necessity of publication of notice in the

Federal court in order to warn the defendant of the proceeding; he knew of it, and to a qualified extent had appeared in it.

Without further notice to him, the court had jurisdiction to enter a judgment enforcible against the attached property. The judgment purported to be rendered as upon personal service and after a finding by the court "that the so-called special appearance for the removal hereinbefore recited was an absolute and unqualified submission to the jurisdiction of this [the Federal] court."

There are expressions in the opinion of the learned judge of the Circuit Court to the effect that the judgment rendered was intended to be effectual only to subject the attached property, (136 Federal Stat. 462,) and it seems to be in the form used in some jurisdictions, which recognize that the property attached is all that is reached by the judgment rendered. But the judgment is absolute upon its face, and entered after a finding of full jurisdiction over the person of the defendant. It is in such form as can be sued upon elsewhere and be pleaded as a final adjudication of the cause of action set forth in the petition, and be executed against other property of the defendant, whereas the court had only jurisdiction to render a judgment valid against the property seized in attachment.

We hold that, to the extent that it rendered a personal judgment absolute in terms, the court exceeded its jurisdiction in the case, not having by service or waiver personal jurisdiction of the defendant.

The judgment to that extent is therefore modified and made collectible only from the attached property. So modified, the judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.